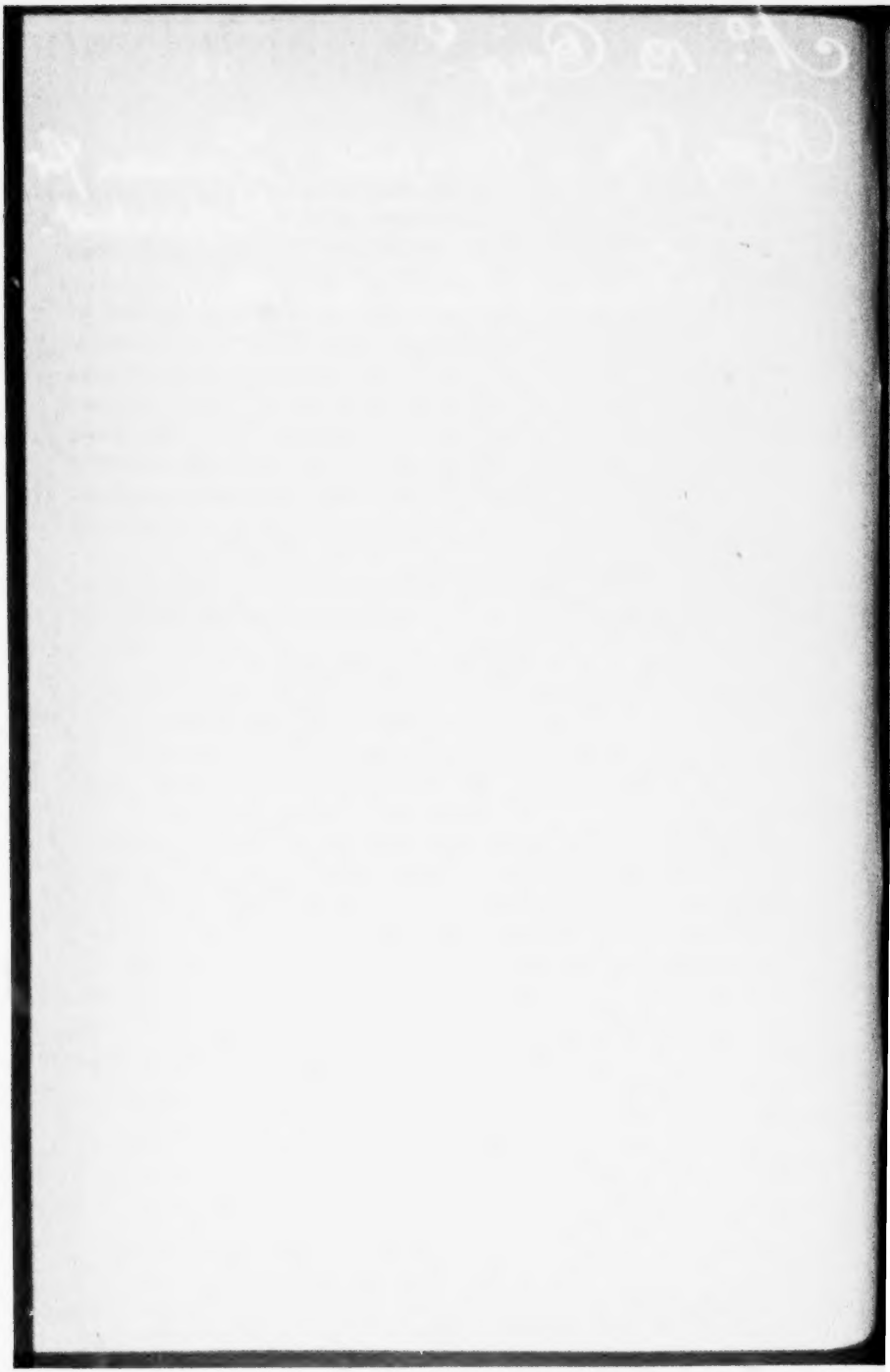

No. 12 Orig.
Reply Br. of Canfield & Goulder for Respondent

FILED
MAY 16 1900
JAMES H. McKENNEY,
Clerk.

Filed May 16, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 12, Original.

EX PARTE: **IN THE MATTER OF THE UNION STEAMBOAT COMPANY, PETITIONER.**

BRIEF FOR RESPONDENT IN REPLY.

FRANK H. CANFIELD,
HARVEY D. GOULDER,
For Respondent.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 5-16-1900

IN THE

Supreme Court of the United States.

No. 12, Original.

EX PARTE: IN THE MATTER OF THE PETITION OF THE UNION STEAMBOAT COMPANY FOR A WRIT OF MANDAMUS.

Oral argument not having proceeded, the court gave leave to respondent to file this memorandum, because Petitioner's reply brief, filed May 14th, may be considered to contain its arguments upon the answer of Respondent to the order to show cause.

I.

We submit that Petitioner's counsel, in their brief, have wandered far from the issue involved in this proceeding, which is, whether respondent, in entering the decree under the mandate of this court, has obeyed that mandate.

They may be said to summarize their whole argument on page 5, in these terms:

> "The objection made here is purely technical. All "the equities in the case can be settled here now, as "the parties in interest are all before the court.
>
> "It can be of no practical interest or benefit to "supply further pleadings. All the defenses that "have not been made can still be made before the "decree is entered."

And so, instead of discussing the issue involved or attempting to point out wherein the mandate of this court has been disregarded, petitioner's counsel discuss the case as though it were now before this court on a new appeal or rehearing.

The argument disregards the facts: That this is an original proceeding to which neither the Erie and Western Transportation Company, its *cestuis que trust*, its steamer *Conemaugh*, or the underwriters, who intervened, are parties; that the collision cause on the merits has been tried and remanded and the decision thereon has become the law of the case and a decree has been entered in the district court; that it is not an appeal or a rehearing, but a proceeding, special in its nature, to inquire only whether the respondent did or did not enter the decree as ordered.

There is no issue as to what effect the bill of lading under which the *Conemaugh's* cargo was being transported would have on the underwriter's claim if it had been made against the Erie and Western Transportation Company or the *Conemaugh*, nor how the bill of lading may affect the *New York*. These questions have not been litigated solely because the petitioner, for some reason of its own, has elected not to have them litigated, although it was entirely within its power to have them determined in the cause without prejudice to its general defense.

II.

It is well settled that the duty of the respondent was simply to obey the mandate and not to add to or vary what this court ordered to be done. It was the respondent's duty simply to render strict and unqualified obedience to the mandate; or, in other words, to enter a decree in strict accordance with what this court had decided.

Ex parte Washington & G. Ry, 135 U. S., 554.

Not dealing with amounts but fixing only the rights of the parties, this court decided:

1. That both the *Conemaugh* and the *New York* were in fault for the collision.

2. That the underwriters on the *Conemaugh's* cargo are entitled to recover their full damages from the *New York*.

3. That the costs of the case should be equally divided between the respective owners of the two vessels.

4. That interest should be awarded at the same rate that decrees bear in the courts of the State of Michigan.

An examination of the decree entered and of the respondent's return or answer shows that decree to be in strict compliance upon all of these points with the opinion, in which not only is there no mention of any right of recoupment, which was therefore excluded from consideration by the respondent, but in connection with and in extension of its decision that the underwriters on cargo recover in full from the *New York*, the court referred to cases which establish in what circumstances a party so paying a third party in full must be relegated to his separate action for contribution.

III.

As already suggested, petitioner's counsel do not attempt to point out wherein the decree does not conform with the opinion.

An instance of disregard of the real point is in the treatment of the damage of the underwriters on cargo: The petitioner had presented to the respondent a form of decree (Exhibit X, page 7, answer) providing direct recovery against the *New York* of full damages for those cargo under-

writers who had intervened; and for the others who, without intervening, stood in the same right as *cestuis que trust* of the libellant, the only provision made was for payment into court or to proctors of a sum about two-thirds the amount of these cargo underwriters' damage, with no provision for the balance or direction as to disposal of this much. Now, here the brief argues in respect to all underwriters on cargo, that they are entitled to nothing or, at best, but one-half their damages; the brief urging that, without apt pleadings (page 5), "as all the parties in interest are before the court," "all the defenses that have not been made can still be made before the decree is entered"—or, with new or amended pleadings, which (page 18) they crave leave to file, such further proceedings, including setting aside the present decree, may be had.

All this notwithstanding the decision of this court, for the respondent the law of the case, and that the inquiry here is solely as to whether, in the decree already entered, the respondent complied with the opinion of the court that the underwriters on cargo recover in full of the *New York;* emphasized as that was by reference to the case of the *Juniata.*

IV.

We may be pardoned reference to a single further instance, the suggestion (page 8) that a defense on the contract or bill of lading is one that must come from the libellant; that when the interveners filed their petitions, the libellant should have answered them.

What argument may properly be made in this proceeding on such a proposition is not apparent, but it might be so construed as to prove misleading.

These interveners made no charge of fault or liability and set up no claim against the *Conemaugh* or her owner, but adopted the charges against the *New York,* and, as did those who

remained *cestuis que trust*, proceeded so exclusively against the *New York* that when the circuit court of appeals held the *New York* free from fault and the *Conemaugh* solely at fault, it also found, necessarily, that this disposed of all claims of underwriters on cargo and all were dismissed accordingly.

The respondent's answer that there was no claim against or impleading of the *Conemaugh* or her owner on any cargo claim is therefore correct.

The argument proceeds on some theory that the admiralty procedure is so loose and unscientific that the status of a party, whether plaintiff or defendant, whether charged with sole liability or with none, is immaterial, so that in any capacity or in any relation he is a party in the case.

This is in direct conflict with the opinion—the law of the case under which the respondent acted, as well as with the *Juniata* and the *Beaconsfield*, and seems to grow out of a confusion of the principle requiring a first determining of the ultimate liability in statutory cases like the *North Star*, the *Chattahoochee* and the recent *Dumois*, in which latter the owners of each vessel applied for the limitation and all interveners were impleaded in both these proceedings.

V.

The petitioner is not asking that its proposed decree be entered, nor (from the course of argument) is it asking for the enforcement of the mandate issued in the cause as tried. To grant what it asks would necessitate recalling the mandate and the revision or reversal of the law of the case.

It is not a question of what this court might or should have decided, or what it would decide on other issues or under new or different pleadings. The petitioner had its choice of remedies. It might have had a remedy by cross-libel or independent action; it might have proceeded by petition under rule 59; or it may

even be conceded, as suggested in the *North Star* case before the rule was adopted, that it would have been enough to have claimed in its answer recoupment in case it be found at fault. Differing from the rule in cases where a party is applying for statutory relief from liability, in the ordinary case none of these are compulsory, but at a defendant's option. It elected not to make the claim by cross-libel, petition, or even answer and is bound by its election.

Ward vs. Fellers, 3 Mich., 281–293.

Even if this were a proper time, place and proceeding to urge such indulgence as is prayed, it ought not to be granted. It is not permissible for a party to try a cause through on a theory under which it saw no necessity for claiming recoupment although the procedure was ready at hand, and then after final adjudication seek to open it and get the benefit of a remedy it did not even care to assert. With full knowledge of the circumstances, with the remedy at hand, it made its election and there is no hardship in leaving it there.

We respectfully submit that the respondent executed the mandate in strict accord with the direction and should be sustained.

F. H. Canfield,
H. D Goulder,
Counsel for Respondent.